

The State Power to Restrict Religious Propagation: Assessing the Constitutional Validity of Section 5 of the Syariah Criminal Offences (State of Penang) Enactment 1996

Nur Mohd Iqzuan bin Samsudin*, Muhammad Aiman Ashraf bin Khairrolzinzah

Faculty of Law, Governance and International Relations, Universiti Islam Melaka, Batu 28, 78200
Kuala Sungai Baru, Melaka, Malaysia

*Corresponding Author

DOI: <https://doi.org/10.47772/IJRISS.2026.100800997>

Received: 05 September 2026; Accepted: 10 September 2026; Published: 22 September 2026

ABSTRACT

Most states in Peninsular Malaysia restrict the propagation of non-Islamic doctrines among Muslims through freestanding enactments made under Article 11(4) of the Federal Constitution. Penang does not. Its restriction sits instead in Section 5 of the Syariah Criminal Offences (State of Penang) Enactment 1996, which reaches "any person, whether or not he professes the religion of Islam" and directs that the offence "may be tried in a Civil Court", although Item 1 of the State List confines Syariah criminal offences to Muslims. This article asks how far that hybrid provision is constitutionally valid when measured against the limits of Penang's legislative competence. It combines doctrinal analysis of the Constitution, the enactment and the case law following *Iki Putra* and *Nik Elin* with semi-structured interviews, analysed thematically and triangulated against the statutory and case law. The informants agree that enforcement must run through the police, the Criminal Procedure Code and the civil courts, and neither knows of a single prosecution, yet they divide on validity. That division, the article argues, follows from the framework each applies, and neither the reach to non-Muslims nor the placement of the provision is decisive on its own, because Article 11(4) restricts propagation by reference to its Muslim recipients and the pith and substance test looks to purpose and effect rather than to the title of a statute. Section 5 is therefore better described as conditionally valid and judicially untested than as plainly void. The article offers a three-level framework separating legislative power, forum and procedure, and institutional implementation, and recommends a legislative audit before any repeal or transfer.

Keywords: Article 11(4) Federal Constitution, state legislative competence, pith and substance, Syariah criminal offences, religious propagation.

INTRODUCTION

Malaysia's ethnic and religious diversity has made the protection of the Muslim faith from the propagation of non-Islamic religions one of the country's most sensitive social questions, and Article 11(4) of the Federal Constitution addresses it directly. Restrictions of this kind are usually defended as a reasonable means of preserving public harmony, on the view that preaching rival doctrines to Muslims would unsettle the Muslim community and strain the social contract on which communal relations have long rested (Mohamed Adil et al., 2023). Penang, however, has given this constitutional restriction a distinctive legislative form. Unlike most other states in Peninsular Malaysia, it has no dedicated, freestanding Control and Restriction of the Propagation of Non-Islamic Religions Enactment (Yahya & Samuri, 2019). Instead, the restriction appears in Section 5 of the Syariah Criminal Offences (State of Penang) Enactment 1996 (the Penang Enactment 1996), which prohibits the propagation of doctrines or beliefs other than Islam among Muslims and provides for the offence to be tried in the civil courts. The difficulty concerns the relationship between the provision's legislative basis, its application to Muslim and non-Muslim perpetrators, and its designation of the civil courts as the trial forum. That immediately puts state legislative competence, and with it constitutional validity, in question, particularly after the Federal Court's landmark decisions in *Iki Putra* and *Nik Elin*, which reaffirmed strict boundaries between federal and state legislative powers (Che Jamaludin Mahmud et al., 2025).

Malaysian scholars have long been uneasy about both the validity and the uneven drafting of offences that regulate non-Islamic religious propagation within state enactments. Restrictions housed in such enactments are frequently questioned on jurisdictional grounds. The Syariah courts have personal jurisdiction over Muslims alone, whereas the propagation of non-Islamic doctrines may also involve non-Muslim perpetrators, who may constitutionally be tried only in the civil courts. Mohd Kusrin et al. (2013) illustrate this difficulty. Although Article 11(4) of the Federal Constitution authorises restrictions on the propagation of non-Islamic doctrines, the absence of a dedicated control enactment in Penang has led the state to retain the offence under Section 5 of the Penang Enactment 1996 while providing for trial in the civil courts. Yahya and Samuri (2019) are less sanguine about the arrangement. On their reading, the absence of specific and uniform control enactments in several states, including Penang, weakens enforcement against non-Islamic religious propagation and creates uncertainty at the civil–Syariah interface concerning the powers of Religious Enforcement Officers. More recent scholarship by Sabirin et al. (2024) identifies a growing number of constitutional challenges to state Syariah laws following *Iki Putra*. The Federal Court has consistently applied the pith and substance test to invalidate state Syariah provisions, as in *Nik Elin*, that encroach upon the Federal List, namely List I of the Ninth Schedule, even where the offences are said to derive from Islamic teachings or precepts. Taken together, these developments call for a closer examination of Section 5's constitutional basis, without assuming that its placement within a Syariah criminal enactment determines its validity.

The study approaches this socio-legal controversy through a single research question that asks to what extent Section 5 of the Penang Enactment 1996 is constitutionally valid when measured against the limits of Penang's legislative competence. The question arises from the provision's combination of three features, namely its placement within a Syariah criminal offences enactment, its express application to Muslim and non-Muslim perpetrators, and its identification of the civil courts as the trial forum. These features require separate consideration of the state's authority to create the offence and the legal basis for its adjudication and enforcement. The constitutional inquiry is therefore framed by Article 74 and the relevant entries in the Ninth Schedule, read with Article 11(4), while Article 4(1) supplies the governing principle of constitutional supremacy. The decisions in *Iki Putra* and *Nik Elin* provide the doctrinal context for assessing the provision's true character and its relationship with matters reserved to the Federation.

The study began with the hypothesis that Section 5 was unconstitutional and that legislative reform should involve its replacement by a separate enactment controlling religious propagation. This initial position arose from concerns that the provision extended the personal scope of a Syariah criminal enactment beyond Muslims and purported to assign criminal trial jurisdiction to the civil courts. It nevertheless depended on two propositions requiring examination, namely that the provision must be characterised as an ordinary Syariah criminal offence despite its propagation-control function, and that the civil court clause confers jurisdiction rather than referring to jurisdiction already available under federal law. The study tests these propositions through doctrinal analysis supported by expert interviews. It also evaluates the initial reform proposal against the alternatives of retention or targeted amendment. The resulting assessment distinguishes legislative competence, forum and procedure, and institutional implementation, allowing the initial hypothesis and proposed reform to be reconsidered in light of the analysis.

LITERATURE REVIEW

Malaysia operates a dual legal system, in which civil law, grounded in the common law, and Islamic law, or Syariah, run alongside one another within a defined constitutional allocation of powers. List II of the Ninth Schedule to the Federal Constitution, the State List, regulates that division closely, confining the power of State Legislatures to create and punish Syariah criminal offences within narrow limits. Under Item 1 of that List, such offences may apply only to “persons professing the religion of Islam” and must concern offences against the “precepts of that religion”, subject to the exclusion of matters included in the Federal List, commonly referred to as the preclusion clause.

Article 11(4) of the Federal Constitution, read together with the relevant entry in Item 1 of the State List, nevertheless confers a specific power on the states to legislate to “control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam”. The purpose of this restrictive power is to protect the Muslim faith from the propagation of other religions, and it is a power that may reach

non-Muslims. Most Malaysian states have acted on it by passing dedicated, freestanding legislation under Article 11(4). Under this statutory framework, a non-Muslim who contravenes the restrictions is tried in the civil courts, typically the Magistrates' Court, because the Syariah courts have no jurisdiction over non-Muslims. Against this background, Section 5 of the Syariah Criminal Offences (State of Penang) Enactment 1996 (the Penang Enactment 1996) adopts a markedly different legislative design, giving rise to a constitutional anomaly that the existing literature has yet to explore. Three principal research gaps follow from that design, none of which earlier studies have recognised, let alone resolved.

In mainstream scholarship on laws restricting religious propagation, researchers such as Yahya and Samuri (2019) and Che Jamaludin Mahmud et al. (2025) consistently conclude that Penang, Sabah, Sarawak and the Federal Territories have no written legislation controlling religious propagation under Article 11(4). Those conclusions overlook a restrictive provision that Penang does in fact have, only not as a separate, freestanding statute, since it is incorporated in hybrid form into Section 5 of the Penang Enactment 1996. This arrangement raises a serious question of constitutional validity. Section 1(2) of the Penang Enactment 1996 expressly confines its application to Muslims, subject to Section 5. Section 5, in turn, provides that the offence of propagating non-Islamic doctrines among Muslims applies to "any person, whether or not he professes the religion of Islam". No doctrinal study has yet asked whether the Penang State Legislature is competent to place a criminal provision regulating non-Muslims within an enactment that, under the constitutional framework in Item 1 of the State List, is in principle reserved for the creation of offences applicable only to persons professing Islam.

The second gap concerns Section 5's direction that the offence of propagating such doctrines "may be tried in a Civil Court". Under the Federal Constitution, the constitution, organisation, jurisdiction and procedure of the civil courts, as courts within the federal system, fall within Parliament's exclusive legislative domain under Item 4 of List I, the Federal List. Although prosecutions for religious propagation among Muslims under the freestanding control enactments of other states, such as *PP v. Krishnan a/l Muthu* in Pahang, are heard in the civil courts, those enactments are state statutes operating through the civil legal system, with enforcement entrusted to the police and prosecution undertaken by the Attorney General. In Penang, the reference to trial in the civil courts appears within a Syariah criminal offences enactment. The issue is whether that reference operates through existing federal jurisdiction or purports to confer additional jurisdiction, a distinction requiring examination of the relevant constitutional and statutory provisions.

Iki Putra and *Nik Elin* clarify that the constitutional validity of a state-created offence depends on its pith and substance and the constitutional allocation of legislative subject matters, rather than merely on its similarity to an existing federal offence. The relevant distinction is between matters included in the Federal List and matters addressed by federal legislation. *Nik Elin* also demonstrates that these limits must be considered alongside the states' specific power to control religious propagation. In upholding Kelantan's Section 30, the Federal Court relied on Item 1 of the State List and/or Article 11(4), concluding that the provision was not caught by the preclusion clause. These decisions provide a doctrinal basis for examining Section 5 of the Syariah Criminal Offences (State of Penang) Enactment 1996, although neither determined its validity. The provision requires particular attention because it expressly applies to Muslim and non-Muslim persons and provides for trial in a civil court. The inquiry must therefore distinguish the state's legislative authority to restrict propagation from the jurisdictional and procedural basis for enforcement through the civil courts, and must assess the provision's application to non-Muslims by reference to the particular source of legislative authority relied upon rather than solely by reference to the personal jurisdiction of the Syariah courts. This study examines how those features should be assessed within the constitutional framework clarified by *Iki Putra* and *Nik Elin*, without presupposing that either the provision's personal scope or its statutory location establishes legislative incompetence.

Third, the study bears on the rule of law and on the fundamental rights of non-Muslims under Article 11(1) of the Federal Constitution. The Syariah courts have no jurisdiction whatsoever over non-Muslims. Although Section 5 provides for cases involving non-Muslims to be tried in the civil courts, the inclusion of this offence within a state Syariah statute raises doctrinal concerns, and adverse perceptions, about the reach of state religious institutions into non-Muslim communities. Clarifying these boundaries therefore matters both to

avoid confusion between civil and Syariah jurisdiction and to protect interfaith harmony from tensions created by the law itself.

Beyond these three gaps, the findings are expected to offer a model for legislative reform in Penang and, more broadly, across Malaysia. Ismail and Mansor (2026) stress that the implications of *Nik Elin* are national in scope and call upon all states to review and restructure their Syariah criminal offences enactments in accordance with constitutional limits. The study will provide a research-based guide to restructuring Penang's laws restricting religious propagation, including whether the hybrid design of Section 5 should be replaced by a separate control enactment under Article 11(4), as adopted in ten other Malaysian states. Such a step matters to the stability of the legal system and to avoiding repeated judicial challenges.

That these gaps are real can be shown from three directions, namely the academic literature, the distinctive structure of Penang's statutory text and the judicial record. The literature comes first. As noted above, Yahya and Samuri (2019), in their comprehensive empirical study, conclude that ten states have gazetted control enactments while four jurisdictions, including Penang, are categorised as having "yet to enact the relevant legislation". The same omission appears earlier in Mohd Kusrin et al. (2013), who state that "the states of Penang, Sabah and Sarawak do not have such enactments". This misclassification arose because earlier legal scholarship focused its search on freestanding legislation, such as enactments controlling and restricting the propagation of non-Islamic religions among Muslims, and therefore did not register Penang's atypical choice to incorporate such control as a limited provision within its general Syariah legislation.

The statutory text provides a further reason for examining Section 5 separately from the Enactment's other offences. The exception carved out by Section 1(2) makes Section 5 the only provision in the Enactment that reaches non-Muslim perpetrators and designates a forum outside the Syariah courts. That exception raises the questions of constitutional basis and legal effect identified above, but does not resolve them. It is the interaction between these two features, rather than the provision's placement alone, that is the focus of the constitutional assessment undertaken here.

The judicial record completes the picture, since no court case or challenge has yet tested a provision with the distinctive features of Penang's Section 5. The limits of state Syariah criminal jurisdiction have certainly been scrutinised closely in *Iki Putra* and *Nik Elin*. In *Nik Elin*, however, the challenged Kelantan provision numbered Section 5 concerned false claims to be a prophet, messenger or Imam Mahdi. That offence rests solely on religious precepts and is entirely different from Penang's Section 5, which concerns the propagation of non-Islamic religious doctrines. Although, as noted above, the Federal Court in the same case upheld Kelantan's Section 30 as consistent with Article 11(4), it did not test the placement of a propagation provision within a Syariah criminal enactment that regulates non-Muslims and assigns trial to the civil courts. The validity of Penang's Section 5 therefore remains an untested area of Malaysian constitutional jurisprudence.

METHODOLOGY

This section sets out the research design and methodological framework used to achieve the study's objective of assessing the constitutional validity of Section 5 of the Penang Enactment 1996 from the perspective of the State Legislature's legislative competence. The study adopts a qualitative socio-legal research design, with library-based doctrinal legal research as its core method, supported by qualitative empirical data obtained through semi-structured, in-depth interviews with legal experts (Dobinson & Johns, 2007; Leeuw & Schmeets, 2016).

The design combines two approaches within a qualitative paradigm in order to bridge the gap between law in books and law in action (Leeuw & Schmeets, 2016). The first, and the principal one, is doctrinal analysis through library research, which works through the constitutional doctrines, statutory provisions and judicial principles governing the allocation of legislative powers between the Federation and the states. The second is qualitative empirical work through supporting interviews, which strengthens that analysis by opening up the substantive difficulties and enforcement procedures of government agencies, the perspectives of Syariah prosecutorial institutions, and the practical implications of the Federal Court's recent decisions.

Doctrinal research proceeds in two stages, the identification of authoritative legal sources and then the analytical and contextual interpretation of their texts. The material collected here falls into two categories. The first consists of primary sources, meaning legal materials that carry binding authority (Bhat, 2019). Within that category three bodies of material are used. The first is the Federal Constitution together with federal statutes, particularly Article 4(1) on constitutional supremacy, Articles 11(1) and 11(4) on religious freedom and restrictions on religious propagation, Article 74 read with Item 4 of the Federal List, List I, and Item 1 of the State List, List II, of the Ninth Schedule, together with the Criminal Procedure Code (Act 593) and Subordinate Courts Act 1948 (Act 92), particularly sections 85 and 87. The second is the state enactments themselves, chiefly the Penang Enactment 1996, whose Section 1(2) governs the scope of application and whose Section 5 creates the offence of propagating non-Islamic doctrines among Muslims triable in the civil courts. The freestanding enactments controlling religious propagation in Melaka are examined alongside it for comparison. The third is case law, namely the written grounds of judgment in which the Federal Court and the lower courts have set out the pith and substance doctrine and the limits of state legislative competence. The four decisions that carry most of the weight are *Iki Putra bin Mubarrak v. Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 323, *Nik Elin Zurina bt Nik Abdul Rashid & Anor v. Kerajaan Negeri Kelantan* [2024] 2 MLJ 150, *Sulaiman bin Takrib v. Kerajaan Negeri Terengganu* [2009] 6 MLJ 354, and *Public Prosecutor v. Krishnan a/l Muthu* (Pahang Magistrates' Court Case No. MA-83-146-2002). The second category consists of secondary sources, which support interpretation, supply the theoretical foundation and make it possible to assess earlier scholarly criticism of the distribution of legislative power. These comprise legal textbooks and monographs on the Constitution, Syariah jurisdiction and human rights in Malaysia.

Turning to the empirical side, the study developed a semi-structured interview protocol whose core questions align directly with the research question and the conceptual framework. This design holds the focus on the validity of Section 5 while leaving room to probe informants' views on enforceability and on the dynamics of federalism in greater depth. Six themes run through the questions. The first two concern the constitutional purpose underlying Article 11(4) and the effect of the phrase "any person, whether or not he professes the religion of Islam" on state legislative competence under Item 1 of the State List. The third asks whether Section 5 is properly characterised as an offence against the precepts of Islam, and the fourth whether the statute requires reassessment after *Iki Putra* and *Nik Elin*. The last two address the competence of the State Legislature to confer criminal trial jurisdiction on the civil courts and the forms of legislative reform and harmonisation available between state laws.

Informants were chosen by purposive sampling, on the basis of direct expertise, professional authority and substantive experience in the drafting, administration and prosecution of Syariah law and in constitutional law. Two were selected, each representing a distinct institutional vantage point. The first (Informant 1) is an officer in the Syariah prosecution department of a state, with several years of experience, and speaks for a local Syariah implementation agency on enforcement constraints, referrals between the civil and Syariah systems, and the practical application of Section 5. The second (Informant 2) is the adviser of another Malaysian state and brings expertise in civil and constitutional law, particularly on the limits of state legislative power, federalism, the validity of provisions that span different jurisdictions, and the consequences of a declaration of invalidity after *Nik Elin*.

Two procedural safeguards governed the collection of this material. Before each session the informant's express consent to participation and to audio recording was obtained in accordance with qualitative research ethics, and informants were told that their verbatim data would be used only for academic purposes. The interviews were then recorded and transcribed in full, word for word, so as to preserve the integrity of the data, its linguistic nuance and the accuracy of the informants' intended meaning.

The two bodies of material are then analysed in different ways. The statutory and case law sources are read through deductive and inductive reasoning within a legal content analysis (Hutchinson & Duncan, 2012), and judicial doctrine is approached through the two tests the superior courts actually apply. The pith and substance test identifies the true nature and character of Section 5, and so whether it is a law regulating religion under Article 11(4) or a general criminal law encroaching on the Federal List. The separation of powers doctrine, read with the preclusion clause, is used to assess how far Sections 1(2) and 5 infringe the personal limits, or

jurisdiction *in personam*, set by Item 1 of the State List, which confines Syariah criminal offences to persons professing Islam.

The interview transcripts were examined by manually marking passages relevant to the research question. The analysis compared the two informants' views, highlighting their similarities and differences. The findings are presented under three themes, namely the constitutional validity of Section 5, the roles of the institutions involved in its enforcement, and the need for legislative reform. The informants' views were then considered alongside the constitutional provisions, legislation and case law. Their statements are presented as professional opinions and accounts of experience, while the legal conclusions are developed through the researchers' doctrinal analysis.

That final step of cross-checking carries the burden of trustworthiness and rigour in the qualitative findings (Patton, 2014). Arguments advanced in the interviews are tested critically against the official statutory texts, including the Federal Constitution and the Penang Enactment 1996, against judgments of the highest court, and against the current peer-reviewed literature. The findings therefore do not rest on subjective assumption, but on doctrinal analysis informed by the realities of legal practice in Malaysia.

Research Findings

Thematic analysis of the two verbatim interview records yielded three main findings, and taken as a whole the interview data did not unanimously support the initial position that Section 5 of the Penang Enactment 1996 is unconstitutional and should be separated at once from the Syariah criminal enactment. Informant 2 accepted much of that concern, particularly as regards the provision's application to non-Muslims and its enforceability by Syariah institutions. Informant 1 rejected the conclusion of unconstitutionality, considering the provision valid because its subject matter concerns Islam while trial, investigation and arrest proceed through the civil legal system. The evidence therefore yields mixed support rather than full confirmation of the initial position.

Although the informants disagreed on validity, they shared several factual premises. Both acknowledged that the Syariah courts have jurisdiction only over Muslims, that Syarie prosecutors cannot bring charges under Section 5, and that action under the provision must proceed through the police, the Criminal Procedure Code and the civil courts. These points of agreement support the finding that Section 5 has an unusual design spanning different jurisdictions. They do not, however, establish that the provision is void. Constitutional validity depends on the source of legislative power and judicial interpretation, rather than solely on the agency that investigates or the forum in which the case is tried.

The first principal finding is a direct disagreement over the effect of the phrase "any person, whether or not he professes the religion of Islam". Informant 2 considered state power over Syariah criminal offences to be confined to Muslims. He stated that "*we can only legislate in respect of Muslims*" and later concluded that Section 5, in its present context, was "*unconstitutional*". On his account, extending the class of persons subject to the offence to non-Muslims exceeds the personal limits that ordinarily govern state Syariah offences. He was consistent on the point, repeating that the provision could not be enforced against non-Muslims and that "*generally speaking, Section 5 in this Penang Criminal Enactment cannot be applied*".

Informant 1 took the opposite view. She acknowledged that the Syariah courts and Syariah criminal offences enactments apply, in principle, to Muslims. Nevertheless, she considered Section 5 consistent with the Federal Constitution because the offence concerns religion and is not tried in the Syariah courts. In her view, the inclusion of a non-Muslim perpetrator "*makes no difference because the person will not be tried in the Syariah Court*". Read in context, her account treats the civil court clause as a mechanism for avoiding a conflict over personal jurisdiction.

As to the character of the offence, Informant 1 also classified Section 5 as relating to the precepts of Islam because the propagation of non-Islamic doctrines concerns matters of faith, or *akidah*. Informant 2 did not offer an equivalent substantive position on this question. He treated it as a matter of interpretation that would be resolved only upon a judicial challenge. Nothing in the interviews, then, supports an assumption that both informants rejected the religious character of Section 5. Rather, Informant 1's evidence expressly supports

state competence by reference to the subject matter regulated, even though disagreement over the persons to whom the offence may apply remains.

The emerging pattern is not a disagreement over the limits of the Syariah courts, which both informants accepted. Their real difference concerns whether assigning trial to the civil courts resolves the question of State Legislative Assembly competence. Informant 2 separated the two issues and focused on who could be made subject to an offence under state law. Informant 1 relied primarily on the civil forum as the basis of validity. On closer analysis, however, the forum argument answers which court may hear a charge, but it does not establish whether the Assembly has legislative authority to create the offence in relation to non-Muslims. The first principal finding therefore establishes a real dispute over competence, but no consensus that Section 5 is necessarily invalid.

The second finding concerns the informants' shared understanding of how Section 5 should operate. Informant 1 explained that, when the department receives enquiries about a possible offence under Section 5, religious enforcement officers are asked to lodge a police report. For this offence, she said, *"the police would carry out the arrest and investigation as well, because it follows the Criminal Procedure Code"*, whether the person concerned is Muslim or non-Muslim. Informant 2 similarly stated that religious enforcement officers cannot charge non-Muslims and that, in the interfaith case he described, a non-Muslim could assist only as a witness. A clear operational pattern emerges. Syariah institutions identify or refer information, but investigation and prosecution under Section 5 do not proceed through Syariah procedure.

This operational finding partly supports the study's premise that placing Section 5 within a Syariah criminal enactment creates a separation between its statutory location and its enforcement mechanism. The data do not, however, show that this separation has caused a prosecution to fail. Informant 1 stated that, in several years at the prosecution department, she had never handled a case under the section and had *"not heard of one yet"* in the state. Informant 2 emphasised that an inconsistency in the law does not resolve itself automatically without amendment by the State Legislative Assembly or a challenge by a party with locus standi. The absence of known cases may indicate that the section is rarely used, that cases are unreported, or that matters are referred elsewhere. It cannot, by itself, be treated as proof of either unenforceability or validity. The implementation data have two implications. First, Syarie prosecutors are not the best source of records for establishing whether the police or the Public Prosecutor have ever acted under Section 5, since such cases fall outside the Syariah prosecution process. Second, the lack of prosecutorial experience under the provision limits the strength of both informants' claims about its practical operation. Police records, Public Prosecutor's Office records and Magistrates' Court registers must therefore be examined before concluding that the provision has never been enforced.

The third finding does not consistently support the study's initial proposal. Informant 1 stated that Section 5 did not require reassessment following *Iki Putra* and *Nik Elin* because it already designated the civil courts as the trial forum. She also regarded it as *"already consistent"* with the Federal Constitution and proposed no specific amendment. Her position squarely rejects the immediate repeal or separation proposed in the initial position. Informant 2, meanwhile, supported the academic assessment that the provision was problematic, but his oral responses did not support immediate reform. He explained that states commonly wait until a provision is challenged, and that voluntary amendment might be perceived as an admission of weakness on the part of earlier lawmakers, damaging the standing of religious institutions and the state government. He remarked that *"it is indeed wrong; everyone knows it is wrong"*, yet favoured the approach that *"it is better to leave it as it is"*, considering the political and institutional harm to be greater. His account distinguishes legal assessment from policy choice, since an informant may accept that a provision is vulnerable while still opposing immediate amendment.

The third finding shows that the initial position combines two claims that need to be separated. The first is that Section 5 is vulnerable on grounds of legislative competence, and here Informant 2 clearly agreed while Informant 1 did not. The second is that amendment through a separate control enactment is urgently required, and neither informant firmly endorsed it, Informant 1 considering amendment unnecessary and Informant 2 preferring, for strategic reasons, to maintain the status quo until a challenge arises. The interviews therefore

cannot be cited for the proposition that practitioners agree with the proposed reform. Table 1 sets the two positions side by side.

Table 1: Comparison of informants' views and their relationship to the initial position

Aspect	Informant 2	Informant 1	Implication for the initial position
Source of power to control religious propagation	State power exists but is subject to limits confining its application to Muslims.	State power exists because the subject concerns Islam.	Both accept the state's underlying source of power.
Non-Muslim perpetrators	Their inclusion undermines the section and renders it unconstitutional.	Their inclusion does not affect validity because cases are tried in the civil courts.	The evidence is divided, and only Informant 2 supports the hypothesis.
Civil court clause	The Assembly may create state offences triable in the civil courts, so the civil forum is not itself a defect.	The clause is the principal reason for considering the section constitutional.	The claim that reference to the civil courts is itself beyond legislative competence is unsupported.
Enforcement	Religious enforcement officers cannot charge non-Muslims, so the section is considered inapplicable through Syariah procedures.	The police investigate, the Criminal Procedure Code applies, and cases proceed through the civil legal system.	Both confirm the separation between the Syariah statute and its operation through the civil system.
Nature of the offence against religious precepts	No definitive answer, since interpretation is said to depend on a judicial challenge.	The section concerns faith and falls within the meaning of the precepts of Islam.	The data do not establish a shared rejection of state competence over the subject matter.
Experience of actual cases	No known challenge, and validity remains unless altered through amendment or a challenge by a party with locus standi.	No case handled or known in Penang.	No empirical evidence of prosecution outcomes or judicial decisions under Section 5.
Need for immediate amendment	Acknowledges the problem but orally favours retaining the provision until challenged, for institutional reasons.	No need for reassessment or amendment.	Immediate reform is not consistently supported.

Note to Table 1: The informants' views are professional opinions recorded during interviews and do not necessarily represent their institutions' official positions. "Support" refers to the relationship between the data and the study's initial position, not to judicial confirmation of Section 5's validity.

Taken together, the three findings indicate that the study's initial position requires refinement. Section 5 does contain a structural tension, since it sits within a Syariah criminal offences enactment and reaches non-Muslim perpetrators, yet depends on civil institutions for investigation, prosecution and trial. The interviews also show that practitioners themselves use different frameworks to assess that tension, Informant 2 giving priority to the personal limits of Syariah criminal law-making powers and Informant 1 to the nature of the subject matter and the civil forum the section specifies.

The interviews do not, however, support a categorical conclusion that the civil court clause itself renders Section 5 unconstitutional. Both informants accept that the State Legislative Assembly may enact at least some state laws whose offences are triable in the civil courts. Examples include the Control of Islamic Religious Schools (Malacca) Enactment 2002 (Enactment No. 3 of 2002) and the enactments of other states controlling and restricting non-Islamic religious propagation. A stronger basis for analysis therefore lies not merely in the choice of the civil courts as the trial forum, but in whether Section 5 can properly be grounded in the state's power to control the propagation of doctrines under Article 11(4) and Item 1 of the State List, even where the perpetrator is non-Muslim.

The interview findings also do not permit the researcher to conclude that Section 5 has failed in practice. Neither informant supplied prosecution records, judicial decisions or investigation files showing that a charge had been dismissed for want of legislative competence. Their lack of experience of cases establishes only that the provision has not been tested in practice within the limits of their own experience. What the interviews establish is operational uncertainty and a dispute over competence, not that Section 5 cannot be enforced.

Finally, neither informant treated a separate control enactment as the only available solution. That proposal remains the researcher's normative recommendation and requires support from doctrinal analysis, comparison of state statutes and an assessment of administrative implications. On the two interviews, one informant endorsed the central constitutional concern but opposed immediate amendment, while the other rejected that concern by relying on the separation of civil and Syariah forums. The empirical evidence therefore strengthens the case for a doctrinal assessment of Section 5 but is insufficient to establish the hypothesis of unconstitutionality conclusively.

DISCUSSION

The principal finding is that the informants' disagreement arises from the legal frameworks through which they read Section 5. Informant 2 assessed the provision through the part of Item 1 of the State List that permits the creation and punishment of offences by Muslims against religious precepts. Within that framework, wording that extends the offence to non-Muslims appears to exceed the limits of state power. Informant 1, by contrast, assessed the same provision through the specific power to control the propagation of doctrines and beliefs among Muslims under Article 11(4) and Item 1 of the State List. This difference explains how the two informants could accept the same constitutional premises yet reach opposing conclusions.

The second interpretation corresponds more closely to the particular structure of Section 5, because the central element of the offence is the propagation of religious doctrines or beliefs other than Islam among Muslims. Article 11(4) focuses on the recipients of the propagation, namely Muslims, and does not state that the person propagating the religion must also be Muslim. Item 1 of the State List, moreover, treats the control of doctrinal propagation as a matter distinct from the power to create offences by Muslims against religious precepts. The phrase "whether or not he professes the religion of Islam" is therefore not necessarily void merely because the Syariah courts lack jurisdiction over non-Muslims. The limits of Syariah court jurisdiction concern the forum and judicial authority, whereas the Assembly's legislative competence must first be determined by the subject matter or pith and substance of the law.

Nor can Section 5's placement within the Syariah Criminal Offences Enactment be the sole basis for declaring it invalid. The pith and substance test requires scrutiny of the provision's purpose, effects and true character, rather than merely the statute's title or the provision's location. Section 1(2) itself makes the Enactment's application to Muslims subject to the exception in Section 5. This design indicates that the legislature recognised that Section 5 had a different personal scope and route to trial from the other Syariah offences in the same enactment. The drafting may be regarded as untidy, but inconsistency of form is not equivalent to a constitutional lack of legislative competence.

The constitutional significance of the civil court clause requires a distinction between creating an offence and conferring jurisdiction to try it. Item 4(a) and (b) of the Federal List reserves the constitution and organisation of civil courts, together with their jurisdiction and powers, to the Federation. Article 121(1) correspondingly provides for the jurisdiction and powers of the High Courts and inferior courts to be conferred by or under

federal law. Section 5 must therefore be examined for its legal effect. Does it merely identify an existing competent forum, or does it purport to confer jurisdiction independently of federal legislation? On the latter interpretation, the clause would raise a distinct legislative competence problem which the religious purpose of the offence could not, by itself, resolve. The state's power to control religious propagation does not automatically include authority to determine the jurisdiction of federal courts.

There is, however, a statutory basis for the former interpretation. Section 85 of the Subordinate Courts Act 1948 gives a First Class Magistrate jurisdiction, subject to the Act's limitations, to try offences carrying a maximum prison term of up to ten years or a fine only. Section 5 of the Penang Enactment 1996 prescribes a maximum of two years' imprisonment, a fine of RM3,000, or both. These penalties also fall within the ordinary sentencing limits under section 87(1) of the 1948 Act. Provided that the offence is validly enacted and no applicable jurisdictional exclusion intervenes, these federal provisions support reading the civil court clause as referring to existing jurisdiction rather than enlarging it. Section 3 of the Criminal Procedure Code supplies a further procedural connection by extending the Code to offences under other laws, subject to written provisions governing their inquiry or trial. On this reading, the offence derives from state legislation, while the forum's authority and procedural framework derive from federal law. This supports the clause's compatibility with the federal allocation of judicial powers, but does not independently establish Penang's competence to create the underlying offence.

The investigative and prosecutorial stages require separate consideration. Under the CPC's First Schedule, an offence under another law carrying imprisonment of less than three years ordinarily falls within the non-seizable category. On the penalty prescribed by Section 5, and absent a special provision altering that classification, section 108 is therefore relevant. Subsection (1) requires referral of the informant to a Magistrate, while subsection (2) makes the exercise of the Chapter's special police investigative powers dependent on an order from the Public Prosecutor. Subsection (3) does not extend that authorisation to arrest without warrant. Prosecutorial authority rests on Article 145(3) of the Federal Constitution, read with section 376(1) of the CPC concerning the Public Prosecutor's control of criminal proceedings under the Code. The informants' descriptions of police referral are thus consistent with a possible civil enforcement route, but do not establish that every procedural requirement has been satisfied in practice. The present study identifies a statutory basis for that route. It does not verify an actual investigation, prosecution or formally adopted inter-agency workflow under Section 5.

Set against the existing literature, the finding on the source of state power accords with Mohd Kusrin et al. (2013), who explain that Article 11(4) authorises State Legislatures to control the propagation of non-Islamic doctrines among Muslims. That literature also identifies the limits of Syariah court jurisdiction over non-Muslims as an implementation problem. Informant 1's view that the matter falls within state power but must proceed through the civil system develops this argument in Penang's particular context. At the same time, Informant 2's view that Syariah institutions cannot act against non-Muslims confirms that the jurisdictional problem identified in earlier studies remains relevant in practice.

A more direct connection emerges with Yahya and Samuri (2019). Their study found that state control enactments are implemented through the combined powers of authorised officers, the police, the Public Prosecutor and the civil courts. The authors also identified difficulties arising from differences between the procedures used by Religious Enforcement Officers and the police, as well as the need for appropriate authorisation and operating procedures at the pre-prosecution stage within the civil criminal justice system. Informant 1's account that complaints under Section 5 must be referred to the police supports this pattern. Penang, however, has no separate control enactment setting out in detail the appointment of officers, investigation, the conduct of prosecutions and the use of procedures in the civil legal system. The study thus extends the literature by suggesting that Penang's principal difficulty may lie in the completeness of its implementation framework, rather than solely in the validity of state legislative power.

The findings must also be read against developments following *Iki Putra* and *Nik Elin*. Sabirin et al. (2024) highlight uncertainty over the limits of State Legislative Assembly power and the need to apply the preclusion clause to avoid encroachment upon the Federal List. Ismail and Mansor (2026) explain that the pith and substance test examines the true character of an offence, including its purpose and effects, rather than merely

comparing its wording with federal legislation. This approach supports Informant 2's concern that a state provision may still be challenged even where no federal offence uses identical language. Yet the same approach also limits the strength of the initial hypothesis, because the title "Syariah Criminal Offences Enactment" does not determine the pith and substance of Section 5.

Nik Elin provides an important comparison. The Federal Court upheld Sections 13 and 30 of Kelantan's Syariah Criminal Code (I) Enactment 2019 after finding that their pith and substance concerned the safeguarding and control of the propagation of doctrines and beliefs among Muslims under Item 1 and Article 11(4). This principle demonstrates that provisions placed within a Syariah offences enactment may remain valid where their true purpose falls within the State List. The analogy strengthens Informant 1's position that the religious character and regulatory purpose of the provision require attention. It is not, however, a direct ruling on Penang's Section 5. The Court has not assessed the wording encompassing non-Muslim perpetrators, the civil court clause or the provision's implementation mechanism as a whole.

This comparison with the literature yields a more balanced interpretation. The findings do not deny the strict limits on state power affirmed in *Iki Putra* and *Nik Elin*. Rather, they show that those principles can point in either direction. Section 5 will be vulnerable if its pith and substance is general criminal law, public order or the creation of judicial jurisdiction falling within the Federal List. The same provision has a stronger basis of validity if its pith and substance is genuinely confined to controlling the propagation of doctrines among Muslims under Article 11(4). The informants' disagreement reflects these two doctrinal possibilities.

At the level of theory, the study's principal contribution is a three-level framework for assessing provisions that span different jurisdictions. The first level concerns the source of legislative power, that is whether the provision's pith and substance falls within the State List. The second concerns forum and procedure, meaning the competent court, the applicable procedural law and the authority responsible for prosecution. The third concerns institutional implementation, including complaint channels, investigation, proof and administrative decisions to enforce a provision or leave it unused. The framework explains why a difficulty at one level does not necessarily invalidate the provision at another.

This framework also refines the relationship between law in books and law in action. In its text, Section 5 encompasses Muslim and non-Muslim perpetrators and identifies the civil courts as the forum. In the practice described by the informants, Syarie prosecutors do not handle the cases, religious enforcement officers refer matters to the police, and no prosecutorial experience can be verified. This gap shows that the existence of a provision does not necessarily produce the institutional capacity to implement it. For socio-legal research, the findings provide evidence that normative validity, institutional enforceability and political willingness are distinct variables.

The political considerations raised by Informant 2 add a dimension that receives less attention in doctrinal analysis. A decision not to amend the law does not necessarily indicate that the state government is confident of its validity. It may instead reflect concerns about institutional standing, perceptions of weakness, political risk or an expectation that no challenge will arise. The absence of amendment therefore cannot be treated as evidence that the provision has been assessed and validated. It illustrates, rather, how a contested law may remain in force through an approach of waiting for a challenge.

From a legal perspective, the study shifts attention from the formal question of where Section 5 is placed to the substantive question of the source of its legislative authority. Analysis must begin by determining whether the elements of the offence genuinely regulate the propagation of doctrines among Muslims. If they do, Article 11(4) and the relevant part of Item 1 of the State List provide a basis of competence that does not depend on the perpetrator's religion. Only then should the preclusion clause be applied to determine whether the offence's true character enters the field of general criminal law under the Federal List.

The second contribution is to clarify that the Syariah courts' personal jurisdiction cannot be equated with the full extent of state legislative power. The Assembly possesses powers over several subject matters that can produce state laws enforceable through the civil courts, including the religious propagation control enactments found in other states. The proper question is therefore not whether the Assembly may create any offence

applicable to non-Muslims in general, but whether the particular offence falls within a matter assigned to the states and has a lawful route to enforcement.

The third contribution is an assessment of the degree of vulnerability of Section 5. On the available data and literature, the provision should not be described as plainly invalid. Its position is more accurately characterised as one of conditional validity that remains judicially untested. The basis for its validity lies in Article 11(4), its purpose of protecting the Muslim faith, and the analogy with provisions regulating doctrine that were upheld in *Nik Elin*. Its vulnerability arises from its hybrid form, uncertainty over the legal basis of processes within the civil system, the absence of detailed provisions governing investigation and prosecution, and the lack of judicial authority testing this particular text. This conclusion offers a more nuanced assessment than the initial hypothesis.

The first policy implication is the need for a legislative audit before deciding whether Section 5 should be retained, amended or transferred to a separate enactment. The audit should examine the source of power for each element of the offence, the basis of civil court jurisdiction, the application of the Criminal Procedure Code, police powers of investigation, the Public Prosecutor's role under Article 145(3), and the position of Religious Enforcement Officers as complainants or authorised officers. Without such an audit, relocating the provision to a new statute would merely change the location of the text and might preserve the same procedural uncertainty.

The second implication is the need for written operating procedures between the Penang Islamic Religious Affairs Department, the police and the Public Prosecutor's Office. These procedures should identify the agency receiving complaints, arrangements for preserving evidence, the process for recording statements, responsibility for opening investigation papers, and the authority granting consent to prosecute. Informant 1's evidence indicates that referral to the police is already used as an administrative response, but the study found no evidence that this workflow has been formally documented or tested in a case. Clarifying the procedure would reduce the risk of complaints stalling because each agency regards another as having primary responsibility.

The third implication concerns statutory design. The state government could retain Section 5 while clarifying the relationship between the offence, police investigation, prosecution in the civil courts and the courts' jurisdiction. Alternatively, it could enact a separate control enactment with comprehensive provisions on officers' powers, investigative procedure and the conduct of prosecutions, and then repeal Section 5 to avoid duplication. If the second option is adopted, the replacement enactment should come into force before repeal so that no legal vacuum arises. A separate statute offers advantages in readability and administration, but separation is not the sole condition of constitutional validity.

Any amendment must also safeguard legal certainty and freedom of religion. The meaning of "propagation", the required mental element, the categories of prohibited communication, the persons protected and the available defences must be clearly formulated. Such clarity is necessary to prevent selective enforcement and to distinguish active propagation from religious practice, discussion or the provision of information that is not intended to influence Muslims. The protection of the Muslim faith permitted by Article 11(4) must still be implemented through intelligible provisions and fair procedures.

The discussion shows that the interview findings do not settle the validity of Section 5, but clarify how that question should be answered. The initial position that the provision is unconstitutional must give way to a qualified one. Its validity depends on whether a court identifies its pith and substance as the control of doctrinal propagation among Muslims under Article 11(4), or as general criminal law and the regulation of civil court jurisdiction under the Federal List. The textual structure, the literature and the analogy with *Nik Elin* mean that the basis under Article 11(4) cannot be dismissed. Uncertainty over investigation, prosecution and the trial forum nevertheless still justifies the conclusion that legal assessment and reform are needed. The study's contribution lies in separating these questions and in proposing that reform be grounded in an audit of legislative competence and implementation, rather than in an assumption that placement within a Syariah enactment determines constitutional validity by itself.

CONCLUSION

The question this article set out to answer was how far Section 5 of the Penang Enactment 1996 is constitutionally valid when measured against the limits of Penang's legislative competence. The answer is that the provision is neither plainly valid nor plainly void. Its reach to persons who do not profess Islam is not fatal in itself, because Article 11(4) restricts propagation by reference to the Muslims who receive it rather than by reference to the religion of the person who propagates. Its direction to the civil courts is not fatal either, because identifying a forum for trial is not the same as constituting a court or enlarging its jurisdiction. What remains genuinely uncertain is whether a court applying the pith and substance test would characterise Section 5 as a control on doctrinal propagation under Item 1 of the State List or as general criminal law reserved to Parliament under Item 4 of the Federal List. Until that question is litigated, Section 5 is best described as conditionally valid and judicially untested.

The contribution of the study is to separate three questions that the existing literature and the initial position had run together, namely the source of legislative power, the forum and procedure through which an offence is tried, and the institutional capacity to enforce it. On that framework, Penang's difficulty is less a matter of where Section 5 sits in the statute book than of the absence of any detailed machinery for investigation and prosecution behind it. The practical course is therefore a legislative audit of each element of the offence and of its enforcement chain, followed by written operating procedures between the religious authority, the police and the Public Prosecutor. Should the state ultimately prefer a separate control enactment under Article 11(4), that enactment must be in force before Section 5 is repealed, so that Penang is not left without any written basis for the control which Article 11(4) permits.

Two limitations bound these conclusions. The empirical material rests on two informants, and although each was chosen for a distinct institutional vantage point, neither could produce prosecution records, investigation files or judicial decisions. Their evidence therefore establishes that Section 5 has not been tested within their own experience, not that it has never been enforced. The doctrinal argument, in turn, rests on an analogy with provisions that *Nik Elin* upheld rather than on any ruling on a provision of Penang's kind. Further research should accordingly seek records from the police, the Public Prosecutor's Office and the Magistrates' Court, and compare the drafting of the freestanding control enactments across the states, so that the assessment offered here can be tested against the way these provisions operate in practice.

REFERENCES

1. Bhat, P. I. (2019). Idea and methods of legal research. Oxford University Press.
2. Che Jamaludin Mahmud, I. I., & Safiuddin, C. M. H. (2025). Exploring the legal framework of Islamic offences in Malaysia: A constitutional and judicial analysis. *Borneo Akademika*, 9(1), 111–136. <https://doi.org/10.24191/BA/v9i1/118999>
3. Control of Islamic Religious Schools (Malacca) Enactment 2002 (Enactment No. 3 of 2002).
4. Criminal Procedure Code (Act 593).
5. Dobinson, I., & Johns, F. (2007). Qualitative legal research. In M. McConville & W. H. Chui (Eds.), *Research methods for law* (pp. 16–45). Edinburgh University Press.
6. Federal Constitution of Malaysia.
7. Hutchinson, T., & Duncan, N. (2012). Defining and describing what we do: Doctrinal legal research. *Deakin Law Review*, 17(1), 83–119. <https://doi.org/10.21153/dlr2012vol17no1art70>
8. *Iki Putra bin Mubarrak v. Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 323.
9. Ismail, S. Z., & Mansor, M. S. (2026). Implikasi kes *Nik Elin* terhadap bidang kuasa dan kedudukan kesalahan jenayah syariah [The implications of the *Nik Elin* case for jurisdiction and the status of Syariah criminal offences]. *Malaysian Journal of Syariah and Law*, 14(1), 278–296. <https://doi.org/10.33102/mjssl.vol14no1.1026>
10. Leeuw, F. L., & Schmeets, H. (2016). *Empirical legal research: A guidance book for lawyers, legislators and regulators*. Edward Elgar Publishing.

11. Mohamed Adil, M. A., Wan Mansor, W. N., & Mohd Amin, A. (2023). The right to freedom of religion and jurisdictional conflicts in Malaysia. *SINERGI: Journal of Strategic Studies & International Affairs*, 3(1), 69–86. <https://doi.org/10.17576/sinergi.0301.2023.06>
12. Mohd Kusrin, Z., Nasohah, Z., Samuri, M. A., & Mat Zain, M. N. (2013). Legal provisions and restrictions on the propagation of non-Islamic religions among Muslims in Malaysia. *Kajian Malaysia*, 31(2), 1–18.
13. *Nik Elin Zurina bt Nik Abdul Rashid & Anor v. Kerajaan Negeri Kelantan* [2024] 2 MLJ 150.
14. Patton, M. Q. (2014). *Qualitative research & evaluation methods: Integrating theory and practice* (4th ed.). SAGE Publications.
15. *Public Prosecutor v. Krishnan a/l Muthu* (Pahang Magistrates' Court Case No. MA-83-146-2002).
16. Sabirin, N. A. M., Shariff, A. A. M., & Yahya, M. A. (2024). Penggubalan undang-undang jenayah syariah di Malaysia: Analisis ke atas kekaburan bidang kuasa parlimen dan dewan undangan negeri [The enactment of Syariah criminal law in Malaysia: An analysis of uncertainty over the legislative competence of Parliament and State Legislative Assemblies]. *Akademika*, 94(2), 346–360. <https://doi.org/10.17576/akad-2024-9402-20>
17. Subordinate Courts Act 1948 (Act 92).
18. *Sulaiman bin Takrib v. Kerajaan Negeri Terengganu* [2009] 6 MLJ 354.
19. Syariah Criminal Code (I) Enactment 2019 (Kelantan).
20. Syariah Criminal Offences (State of Penang) Enactment 1996 (Enactment No. 3 of 1996).
21. Yahya, Z., & Samuri, M. A. A. (2019). Punca kuasa dan bidang kuasa Pegawai Penguatkuasa Agama Islam berkaitan Enakmen Kawalan Pengembangan Agama Bukan Islam kepada orang Islam di Malaysia [The legal basis and scope of powers of Islamic Religious Enforcement Officers under enactments controlling the propagation of non-Islamic religions among Muslims in Malaysia]. *UMRAN – International Journal of Islamic and Civilizational Studies*, 6(1), 79–101. <https://doi.org/10.11113/umran2019.6n1.257>